Supreme Court, U. S.
FILED
APR 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-1200

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC., PETITIONER

v.

JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

MEMORANDUM FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1200

AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC., PETITIONER

v.

JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

MEMORANDUM FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE IN OPPOSITION

The Secretary of Health, Education, and Welfare is a party to the proceeding out of which this controversy arose. Although the Secretary took no position in the court of appeals on petitioner's motion for a transcript of the oral argument in that court, petitioner has served the Secretary with the petition for mandamus. The Secretary is therefore a respondent here, under Rule 31(3) of the Rules of this Court.[1]

---

[1]We have informed the judges of the court of appeals of the position taken here, and we have advised them that if they wish to state their position separately, they may respond to the petition on their own behalf.

1. Petitioner, the appellant in *American Association of Councils of Medical Staffs of Private Hospitals, Inc.* v. *Califano,* C.A. 5, No. 76-4156, argued October 10, 1977, sought to obtain a transcript of the oral argument in that case in the court of appeals. That motion was denied (Pet. App. A-4). On a motion for reconsideration, the court stated that it was the court's "undeviating policy [not to furnish] transcripts of the tape recording of an oral argument" (Pet. App. A-9 to A-10). The court added that for good cause it has permitted counsel to employ stenographers to record the oral argument (Pet. App. A-10). After denial of a petition for rehearing *en banc* (Pet. App. A-17), petitioner filed this motion for leave to file and petition for a writ of mandamus.

2. We do not believe that mandamus is appropriate here. This Court ordinarily declines to exercise its authority to issue extraordinary writs when other adequate remedies are available. *Ex parte Peru,* 318 U.S. 578, 584-585. In *Ex parte Fahey,* 332 U.S. 258, 259-260, this Court explained some of the reasons that petitions for extraordinary writs from this Court are disfavored:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

The present case is not such an extraordinary cause. A petition for a writ of certiorari would be the appropriate means for petitioner to present its claim to this Court.[2] Petitioner contends that it seeks to obtain a transcript of the oral argument in the court of appeals in order to aid in preparing for any subsequent appeals and in order to "preserve a complete historical record of the appeal proceedings" (Pet. 10). Petitioner does not suggest that the lack of a transcript of the oral argument will prejudice it in this litigation or that there is any disputed issue about what took place at oral argument that might create a particularized need for reference to the court's tape recording of the oral argument.

Petitioner's objection, moreover, is primarily that the Fifth Circuit's policy of not permitting access to tape recordings of oral argument was unpublished, and that petitioner was therefore not put on notice that it should request permission in advance to have the argument transcribed by a private stenographer.[3] But in light of the practice of courts such as the Second Circuit (see Pet.

---

[2]Review of proceedings in the court of appeals is not limited to review of final judgments. See 28 U.S.C. 1254(1). But petitioner's motion for reconsideration of the order declining access was denied on November 7, 1977 (Pet. App. A-9), and the motion for leave to file a petition for a writ of mandamus was not filed until February 24, 1978. If the motion were treated as a petition for a writ of certiorari, it would be jurisdictionally out of time under 28 U.S.C. 2101(c). Petitioners' suggestion of rehearing *en banc* did not toll the time within which to file a petition, because it was a successive application for reconsideration. It may be, however, that petitioner will have another 90 days within which to file a petition once a final decision has been entered.

[3]Petitioner does not contend that the Fifth Circuit's policy is unconstitutional or that it violates any statutory or common-law principles requiring that the recordings be made available, claims that are now pending before this Court in a somewhat different context in *Nixon* v. *Warner Communications, Inc.,* No. 76-944, argued November 8, 1977.

App. A-20), which also require attorneys who wish transcripts of oral arguments to make arrangements in advance, petitioner should have made inquiry regarding the Fifth Circuit's practice before oral argument, rather than assuming that the court's tape recordings would be made freely available afterwards.

We believe that it would be improper for the Fifth Circuit to apply its rule against making tape recordings or transcripts of oral arguments available in a case in which a particularized need for access to the recording were shown—if, for example, there arose a dispute about whether a particular representation or concession had been made at oral argument. Moreover, we believe that it would be preferable for parties to have access to transcripts on request, without making any showing of need. Transcripts of arguments in this Court are available, and the court of appeals has not indicated why it follows a different practice. But however that may be, in this case, because of petitioner's failure to inquire in advance about using a private stenographer to record the argument, and because there is no claim of specific prejudice, there is no sufficient reason for this Court to issue an extraodinary writ.

It is therefore respectfully submitted that the motion for leave to file a petition for a writ of mandamus should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04